

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
June 26, 2007 Session

STATE OF TENNESSEE v. GARY JOSEPH LATHAM

**Appeal from the Criminal Court for Cumberland County
No. 7217 Leon Burns, Jr., Judge**

No. E2006-02262-CCA-R3-CD - Filed March 20, 2008

The defendant, Gary Joseph Latham, was convicted by a Cumberland County Criminal Court jury of aggravated child abuse and sentenced to serve twenty-two years in the Department of Correction as a Violent Offender. In his appeal, he claims that the trial court erred in (1) denying the motion for judgment of acquittal, (2) admitting evidence of his prior acts toward the victim, (3) admitting a statement he made at the victim's bedside in violation of the clergy-penitent privilege, and (4) admitting opinion testimony from two of the state's expert witnesses. Concluding no error exists, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which THOMAS T. WOODALL and D. KELLY THOMAS, JR., JJ., joined.

Gregory P. Isaacs, Knoxville, Tennessee, for the appellant, Gary Joseph Latham.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; William E. Gibson, District Attorney General; and Gary McKenzie, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

This case arises from the death of five-year-old Hope Alexandra Manning, who died after receiving a closed head injury while in the care of the defendant, who was the victim's mother's boyfriend. The defendant was charged with felony murder in the perpetration of aggravated child abuse and aggravated child abuse.

At the trial, Sonda Manning Harris testified that the five-year-old victim was her niece. She said she lived in the home with the victim, the victim's mother, the defendant, and her sister Shanna for about a month in October and November 2002. She said that her parents were divorcing and that

there was no room for her in the place her mother was living. She said the defendant and Monica, the victim's mother, provided for Shanna and her.

Ms. Harris testified that while living in the home, she witnessed an incident in which the victim requested ice cream for breakfast and the defendant "back-handed" the victim "[h]ard enough to bust her lip open." She said she also witnessed the defendant whip the victim "many times." She said one of the whippings was in response to the victim denying that she spilled a container of juice in her bedroom. She said the victim's mother was at work during this incident, which lasted for fifteen to twenty minutes. She described another whipping in which the defendant told her to "turn up" the television and took the victim into the back bedroom. Ms. Harris said she went to the bedroom to ask the defendant a question and saw the defendant holding the victim by her arm and forcefully whipping her. She said she did not talk to the defendant about his conduct because she was afraid he would harm her. She said that on one occasion the defendant slammed down a telephone and then picked it up like he was going to hit her after the victim told the defendant that Ms. Harris had damaged one of the victim's dolls.

Ms. Harris said she never reported the incidents until the victim was in the hospital. She said she had discussed the situation with Monica, who told her to mind her own business. On cross-examination, she admitted that she had been questioned by the authorities but had not revealed the defendant's conduct toward the victim.

Ms. Harris testified that the victim had lived with the victim's grandmother for about two years before living with Monica and the defendant. She said the victim was close to her grandmother.

Fifteen-year-old Shanna Manning testified that the victim had been her niece. She identified Monica and Sonda as her sisters. She said she was "cruising town" with her sisters and the victim one evening when they met the defendant. She said she, her sisters, and the victim were all living with her mother, Janet Manning, at that time. She said she had also lived in the house with the defendant, Monica, the victim, and Sonda in late 2002. She said she was twelve or thirteen years old at the time.

Ms. Manning testified that the defendant "back-handed" the victim once when she asked for ice cream before breakfast and another time when the victim called Monica a name. She said the victim's lip bled in the incident related to the ice cream. She admitted, however, that she did not actually see the defendant strike the victim. She said she turned and saw the defendant's hand moving away from the victim's face and saw the victim's face bleeding. She said that when the victim misbehaved, the defendant told them to turn up the television volume and took the victim to the back bedroom. She said that she would hear the victim screaming and that this type of incident would last ten to fifteen minutes. She said these incidents occurred "every other day, every few days, something like that." She admitted that she never actually saw the defendant spank the victim.

Ms. Manning testified that she was present at UT Hospital after the victim's injury. She said the defendant told her he turned to lock a door, heard a thud, and when he turned around he saw that the victim had fallen down the steps in front of the house.

She testified that the victim had been close to Janet Manning. She said Monica and Janet Manning were estranged at the present time.

Ms. Manning acknowledged that she and Sonda had nowhere to go in November 2002 and that the defendant and Monica had allowed them to move into their home. She said that Monica and the defendant provided food and clothing for them and that the defendant had helped her with her homework. She said that based upon her observations, Monica was a good mother and had loved the victim very much.

Ms. Manning said she was not interviewed by DCS. She said that she thought they had talked to others who lived in the house but that she had not been there.

Patti Davis testified that she had been an elementary school teacher for about thirty years and that she had been the victim's kindergarten teacher at Crossville Elementary. She said the victim was a transfer student from another school and had enrolled in mid-October when her family moved. She described the victim as a timid child who rarely smiled. She said the victim was not clumsy. She said the victim was frequently tardy for school.

Ms. Davis testified that the victim had a "busted lip" one day. She said that she asked the victim how she had been injured and that the victim first said she had fallen but then said her daddy had hit her. Ms. Davis said the victim referred to the defendant as her daddy. Ms. Davis said she called DCS based upon the victim's explanation of the injury. She said this took place sometime between mid-October and December. She said the victim had also come to school between Thanksgiving and the first day of December with a small bruise and a "slight cut" around one of her eyes.

Ms. Davis testified that she did not recall Monica coming to the school to discuss her concern that the victim had been pushed down on the playground by a larger child. She said the victim appeared to be healthy and that pinpoint bruises were not unusual on children who were four and five years old. However, she said she would be concerned about a pattern bruise which had a shape such as a cord, belt, or knife.

Ms. Davis testified that there had been a problem with lice in the school and that the victim had missed some school because she had lice. She said that a lice infestation was treated with medication and by combing the person's hair with a fine-tooth comb to pull out the nits.

Regina Randolph testified that she was employed as an RN in the emergency room at Cumberland Medical Center and was on duty on December 10, 2002, when the defendant arrived with the victim. She said she was called to the registration area, where she found the defendant with

the victim in his arms. She said the defendant stated that they needed help and that he did not know what had happened and that they had been going up steps and the victim had fallen behind him. She said the defendant said the victim's "pupil was blown" and that he never answered her question about what happened. She said he asked, "What does it matter what happened?" She denied that he ever said he was at a truck when the victim fell. She said the victim appeared to be in "grave condition" and was unresponsive. She said this case was notable because it was not typical for a child to be in such a serious situation and for no one to be able to tell the staff how the child was injured.

Ms. Randolph testified that she took the victim into a room for treatment and that the defendant stayed in the room and was aggressive and somewhat disruptive. She said he was yelling at times. She said a woman, who she assumed was the victim's mother, came into the room at some point. She said the woman did not say anything.

Ms. Randolph said the victim had some unusual bruises. She said there were bruises in a circular pattern around the belly button and on the victim's ear. She said that she had bruises and a textured brown place on her forehead and that she was missing hair on the front of her forehead. She acknowledged that the victim had been intubated and strapped down before being transported to UT Medical Center. She said, however, she had seen bruises and missing hair on the victim before treatment began.

Annette Hankins testified that she was employed as an RN in the emergency room of Cumberland Medical Center and that she was the "charge nurse," or nursing shift leader, on duty on December 10, 2002, when the victim was treated. She said the defendant was present in the trauma room where the victim was treated. She said the defendant denied knowing what had happened to the victim and made statements including, "What does it matter what happened? Just take care of her, just help her." She said he was questioned repeatedly and at one point said something about a truck and a fall. She said the doctor who was treating the victim, Dr. Jons, made a statement about the victim's pupil being blown and the defendant yelled out, "What does that mean? What are you doing? What's going on?" She said the defendant was "very disruptive" and that she asked Regina Price, the patient advocate, to get the defendant out of the room.

Ms. Hankins testified that the victim had multiple areas of bruising, abrasions, and missing hair and that these injuries were on the victim's body before medical treatment began. She said that they were able to resuscitate the victim, who had been unresponsive, and that the decision was made to transfer the victim to a trauma center. She said that several members of the hospital staff met with the defendant and the victim's mother. She said the victim's mother did not speak and was crying on the defendant's shoulder. She said that the defendant was informed that the victim had a potentially fatal brain injury and that he asked why they were uncertain about her prognosis and why she could not be treated at that hospital.

Ms. Hankins testified that after she spoke with a nurse from the hospital where the victim was being transferred, she went outside and found the defendant on the emergency room ramp. She

said she asked him if he needed any help and that he walked back inside with her. She said he made the statement, "This is all my fault, I should have carried her up the steps, and I'm going to be blamed for this." She said she asked him what happened and he said the victim had fallen. She said that she asked how she fell and that the defendant said he was walking up the steps, heard a thump, looked around, saw the victim not moving, and was unable to wake her. She said she asked the defendant exactly how far the victim fell and the defendant told her one step. She said the defendant told her the victim had not fallen hard and he did not understand how this could have happened. She said that when this conversation took place, the victim's mother was not present because she had gone with the victim in the ambulance.

On cross-examination, Ms. Hankins acknowledged that she had written in a report, "Father reports patient slipped on wet steps and fell." She said she felt certain that what she wrote in the report was what the defendant told her. She said that although the report said "steps," the defendant told her the victim fell off one step. She also acknowledged that she had written a question mark beside a box that said "sexual abuse."

Ms. Hankins testified that she felt something was wrong with the situation and that she reported her concerns that something was amiss to UT Medical Center. She said she reported some of her conversation with the defendant to the staff at UT.

Regina Price testified that she was employed as a patient advocate, social worker in the emergency room of Cumberland Medical Center. She said she was working on the day the victim was treated. She said that when she first saw the victim, Regina Randolph had the unconscious child in her arms. She said the defendant came in with the victim and the victim's mother arrived minutes later. She said the defendant's behavior was bizarre. She said that he was screaming for the staff to help the victim and that he said they were in the truck and the victim fell and hit her head. She said the defendant reported that the victim had fallen forward and that she had fallen backward. She said he was pacing in the room. She said the defendant repeatedly stated when asked various questions about the victim's medical history, "Nothing is wrong with her except stopped-up tear ducts, that's the only thing that's ever been wrong with her." She said the defendant was so out of control that she had to take Monica Manning¹ and him next door. She said he continued his out-of-control behavior, pacing back and forth and grabbing Monica Manning's legs and saying "You're going to leave me, you're going to leave me. They're going to blame all of this on me. You're going to leave me." She said Ms. Manning consoled the defendant. She also said the defendant told her that DCS had already been called about him once. She described the defendant's behavior as theatrical and said he became very calm after the victim and Ms. Manning left in the ambulance. She said she had written in her notes that the defendant and Ms. Manning were upset and crying but that the defendant was not crying the entire time and did not cry after the victim and Ms. Manning left in the ambulance.

¹The victim's mother is identified in the transcript as both Monica Manning and Monica Manning Latham. We infer that the defendant and the victim's mother were married after the offense occurred.

Ms. Price testified that she questioned Ms. Manning before she left. She said Ms. Manning reported that she had come home and that the victim was lying in a bed when she arrived.

Doctor Charise Jons testified that she was a board-certified emergency medicine physician and was on duty at Cumberland Medical Center when the victim was treated. She said she heard a commotion and saw one of the nurses escorting a man with an unresponsive child in his arms. She said the man asked for help and had "kind of an attitude," although she could not hear exactly what he was saying due to the commotion. She said she and several nurses began treating the victim. She said the victim's breathing was irregular and that she needed an "airway kit" to help her breathe. She said the victim's pupil was "blown," or dilated and fixed, which indicated traumatic brain swelling. She said the victim's breathing was shutting down due to the amount of pressure from the brain swelling. She said the defendant asked what was meant by a blown pupil and that his behavior was causing things to be more chaotic in the room. She said that as part of the treatment, the victim was sedated and paralyzed, had her breathing controlled by a ventilator, had her airway secured, and was catheterized. She said that she discovered a bruise over the victim's pubis when the catheter was being placed and that this was something that required reporting because it raised the concern of sexual abuse.

Doctor Jons testified that she asked the defendant what happened and he said something about a truck and a fall. She thought he also said for the staff to take care of the victim and questioned why they needed the information about how the victim had been injured. She said that while she was waiting for a nurse to give the victim some medicine, she listened to Ms. Hankins talking to the defendant and heard the defendant say the victim had fallen backwards behind him on the steps. She said he did not say from which step she had fallen. She said that she asked the defendant what had happened and that he told her he was going up the steps with the victim behind him when the victim fell backwards. She said that later, she asked the defendant again what happened and that he told her he pulled up to a driveway, the victim got out of the truck, and the victim slipped and fell on the first step, striking the back of her head.

Doctor Jons testified that she asked for the defendant and the victim's mother to be taken from the small room in order for there to be room for x-ray equipment to be brought in and the medical personnel to work. She said she made arrangements for the victim to be transferred to UT Medical Center to be seen by a trauma surgeon or neurosurgeon.

Doctor Jons testified that in her opinion, the victim's injuries were not consistent with the information she had been given about the manner in which the victim had been injured. She noted that the victim had "a pattern almost across the top of her forehead, and they were almost small, as if fingertips, or some type of small . . . pattern across her forehead," a patch of missing hair, a cut on her ear, and bruises on several parts of her body. She later clarified that the pattern on the forehead did not look like fingerprints but were the size of a fingertip. She said none of the bruises were linear as would be expected with a fall down stairs. She said bruises on the arms and legs of a child who was the victim's age were not unusual, but bruises on the trunk were more unusual. She specifically identified the bruises on the victim's forehead, pubis, and left flank as not being

consistent with the defendant's explanation of the victim's injury. She acknowledged that hair loss may be caused by a person wearing her hair tightly pulled back. She said the victim's hair loss was asymmetrical on the left and right sides of her head. She said that neither the defendant nor the victim's mother told her that the victim had been treated for a lice infestation and that the pattern of hair loss was not consistent with lice treatment.

Doctor Jons testified that she reported suspected child abuse or neglect of the victim. She said she was concerned because she could not get the defendant to tell her what had happened and the victim had bruising all over her body. She said that it was her opinion with "a hundred percent certainty" that the victim had not been injured from a fall down one to four steps.

On cross-examination, Doctor Jons said the victim did not have a deceleration head injury. She said that "coup-counter-coup" injuries did not typically occur in children, although she acknowledged that there were cases of children under the age of three suffering coup-counter-coup injuries.

Doctor Jons testified that she had written in her medical report a social history of there having been a domestic disturbance call at the victim's home the previous night. She said she wrote this after receiving that history from Officer Potter of the Crossville Police Department. She said that this information further supported her concerns about the suspicious nature of the victim's injury and that she thought it was important to provide this information to the victim's treating physicians in Knoxville. She said, however, that she formed her opinion about the possibility of "foul play" being involved in the victim's injuries before she received any information from Officer Potter.

Doctor Jons testified that it was possible that the victim's forehead bruises were consistent with her head being in a hand and being slammed backwards into a wall. She said that based upon the CT and pathology reports she had reviewed, the victim's injuries were consistent with repeated blows, rather than a single blow. She said the victim had more than three injuries to her brain.

Casey Cox testified that he was formerly employed as a criminal investigator with the Cumberland County Sheriff's Department. He said that on December 12, 2002, he went with other law enforcement officers and an assistant district attorney to the defendant's home to search it. He identified sketches he made of the defendant's residence. He also identified photographs taken of the location where the officers found a clump of hair near an entertainment center. He identified from one of his sketches the location in a child's bedroom where the officers found a dent in the sheetrock about the size of the top of a styrofoam cup which had "a small light blond/brown hair" hanging from it. He said the dent was behind a door and did not correspond with the door knob. He said he did not recall but could not be sure there was no hook or anything hanging on the door. Mr. Cox testified that they measured the steps and that their rises ranged from seven and one-eighth inches to seven and a half inches, the total height being twenty-nine and three-quarters inches.

Bradley Nealon testified that he was formerly employed as the chief investigator for the Cumberland County Sheriff's Department and that he went to the defendant's home on December

12, 2002, to conduct a consensual search of the residence. He said that he discovered the indentation in the sheetrock and the hair attached to it in the child's bedroom. He said he cut a section from the sheetrock and preserved it as evidence, and he identified the section of sheetrock, which was received as an exhibit. He said the clump of hair in the photographs was on the living room floor. He said he attended the victim's autopsy and obtained hair standards from the medical examiner. He said the victim's hair standards and hair found at the defendant's home were taken by Officer Potter to a laboratory for comparison.

Mr. Nealon testified that the defendant came to the sheriff's department on December 12 to speak to someone about the property receipt that had been left at his home. He said the defendant was upset and asked several questions about items listed on the receipt. He said the defendant cried. He said the defendant asked him in a low voice whether they found signs of a struggle. Mr. Nealon said he told the defendant he did not find anything of such significance as to indicate that two grown men had gotten into a fight. He said he had not mentioned a struggle before the defendant asked him this question.

Mr. Nealon admitted on cross-examination that the mat that was at the bottom of the steps was not collected on December 12. He said he removed the hair from the piece of sheetrock but did not notice whether the root or tip was in the wall. He said the sheetrock was provided to the medical examiner at the time of the autopsy.

Wiley Potter testified that he was employed as an investigator with the Cumberland County Sheriff's Department. He said he received information about the case on December 10, 2002, from Deputy David Hamby and a nurse at Cumberland Medical Center. He said he went to the sheriff's department to meet with a DCS worker and traveled to UT Medical Center. He said that he arrived at about 9:00 p.m. Central Time and that he and a DCS worker took photographs of the victim. He identified several photographs of the victim.

Tom Lawless testified that he was the owner of a house that his wife had rented to the defendant. He identified a photograph of the house and said he had built the stairs which led to the back deck and the landing at the bottom of the stairs. He said that they were made of wood and that a rubber mat covered the landing. He identified the mat and said he had provided it to the state about a month earlier. He said the defendant had never complained about the steps.

John Kilbourn testified that he was a forensic scientist who specialized in trace evidence analysis. He said he analyzed several groups of hair that were submitted to him by Wiley Potter: a single strand identified as coming from sheetrock, a sample of hairs from the victim, a clump of hair from the living room floor, and hairs from a broom. He said that he analyzed the samples and determined that the hair from the sheetrock and the clump from the floor were consistent with the known sample of the victim's hair. He said both the hair from the sheetrock and the clump from the floor had anagen roots which were consistent with having been forcibly removed. He admitted, however, that he did not have a means for determining how hair has been forcibly removed. He said the hair from the broom was not consistent with the victim's hair. He said he submitted two slides

containing hair samples to Orchid Cellmark for DNA analysis. Mr. Kilbourn testified that he was not informed the victim had a lice infestation. He said it would be necessary to remove lice forcibly from a person's hair.

The parties entered into a stipulation regarding the DNA analysis. The substance of the stipulation was that the DNA from the hair removed from the drywall was consistent with DNA from a sample of the victim's blood.

Doctor Mary Palmer Campbell testified that she was employed at East Tennessee Children's Hospital and that she was board certified in pediatrics and pediatric emergency medicine. She said she was asked to go to UT Medical Center on December 11 to consult on the victim's case. She said the victim was memorable due to the extent and dramatic nature of her injuries.

Doctor Campbell testified that she examined the victim, who was lying in bed intubated with lines placed in her. She said the victim had extensive bruising across her forehead and into her scalp. She said she could feel swelling on the back right side of the victim's head. She said the victim had numerous bruises, some of which might be from normal play, and some that were of concern, such as one at the belly button and one above the victim's private area. She said there was a "pinch mark" bruise on the upper left arm. She said there were bruises on the victim's back which might or might not have been from normal play.

Doctor Campbell testified that she reviewed the victim's CT scans. She said the victim had extensive brain swelling on the right and had blood collecting between the two sides of the brain. She said the victim had neurological deficits, including a blown pupil, which she explained was a dilated pupil that does not respond to light, which reflects damage to the brain and eye nerve. She said that if the blown pupil were observed within the first thirty minutes following the injury, this would indicate extensive swelling caused by a severe injury. She said the victim died very quickly.

Doctor Campbell testified that she interviewed the victim's mother, maternal grandmother, and the defendant. She said she was given a history that the defendant had gotten the child out of a truck, that the victim had several things in her hands, that the victim had gone up the stairs, that the defendant turned back to the truck, that the defendant heard a sound and turned around to find the victim on her right side with her arms out, that the defendant took the unresponsive victim inside and splashed water on her face, that the victim's mother arrived, and that the defendant and the victim's mother agreed to take the victim to the hospital. Doctor Campbell said she did not have any information about the number of stairs.

Doctor Campbell testified that her medical findings and the test results were not consistent with the defendant's explanation of the victim's injury. She said the victim's injuries were "absolutely inconsistent with known medical knowledge from a short fall down stairs." She said that a person injured in a fall typically injures just one part of her body, but the victim had injuries on every surface of her head. She said it was not conceivable that a person would suffer an internal brain injury to the degree suffered by the victim in a fall from four or fewer steps. She said she was

uncertain whether the victim's brain injuries could have been caused by only one blow but said that if they were, it was a very severe blow. She said the victim's external head injuries could not have all been caused by one blow.

Doctor Campbell testified that the victim's maternal grandmother told her that she and the victim had a good relationship and spoke regularly and that the victim confided in her grandmother about the victim's mother's relationships. She said the grandmother reported that she had helped raise the victim for the first two years of her life. She said the grandmother related that the victim was excited about living with the defendant.

Bertha England testified that she was employed as a school nurse and had performed a check for lice on the victim on December 9, 2002. She said that the victim did not have lice and that she did not notice any bruising on the victim's head or any hair missing. Ms. England was shown a photograph of the victim and stated that the victim did not have the hair loss shown in the photograph when she examined her on December 9. She testified that treatment for lice did not involve pulling the hair but that it involved combing through hair treated with medication with a fine-tooth comb to remove the nits, or lice eggs.

David Roberts testified that he was employed as a chaplain at UT Medical Center on December 13, 2002. He said he was present when the victim's life support was discontinued. He said he was in the victim's room with the family and members of the hospital staff. He said the defendant leaned down, kissed the victim's fingers, and whispered into the victim's ear, "Baby, baby, come back. Daddy won't hurt you." He described the defendant as "kneeled down by the bed like he was apologizing." He said the defendant was crying. Mr. Roberts said he was standing across the bed from the defendant when this happened.

The parties stipulated to an exhibit which was Monica Manning's time card from Ryan's Steakhouse. The exhibit reflected that Ms. Manning was at work until 2:15 p.m. on December 10, 2002.

Doctor Thomas Deering testified that he was a forensic pathologist and performed the autopsy of the victim. He said the victim's cause of death was blunt trauma injuries to the head and the manner of death was homicide. Doctor Deering used a styrofoam head he had marked to explain the victim's head injuries. He marked on the head the locations of the victim's bruises and scrapes, of which he said there were a total of fourteen. He said the victim had a large subdural hemorrhage in the right side, which he said was bleeding inside her head. He said she also had a left-sided "small bleed . . . adjacent to that upper spinal cord." He said she had severe brain edema, or swelling. He said she had a right uncal herniation, which he said referred to a portion of the temporal lobe of the brain. He said she had a Duret's hemorrhage of the pons, which he said referred to bleeding in the pons portion of the brain. He said she also had multiple cerebral cortical contusions, or brain bruises. He said she had focal brain necrosis, meaning a dead area. He said she had intraparenchymal hemorrhages, or small bleeds inside the brain.

Doctor Deering testified that the victim was forty-four and one-half inches tall and weighed thirty-five and one-half pounds. He said, however, that her weight would have been affected by the organ harvest that had taken place before the autopsy.

Doctor Deering testified that he was given a history of the victim having fallen backwards from two or three steps, striking the back of her head, losing consciousness immediately, and having respiratory difficulties. He said this type of fall was a “trivial fall” and was not the type of fall that would cause severe brain injury and death fairly quickly. He said the immediate loss of consciousness indicated there were rotational injuries of the brain involved. He said it was extremely rare for children between the ages of five and nine to die from falls of less than eight to ten feet. He said that when comparing the statistical fatalities with the victim’s case, the victim’s case did not fit the pattern of the other fatalities. He said, “[T]hat immediately tells me that the story that I’m getting is not matching the injuries that I see.”

Doctor Deering testified that he was provided with the piece of sheetrock from the victim’s room and that the indentation in the sheetrock was consistent with the victim’s head. He said that he was given information that the center of the indentation was thirty-eight and one-half inches from the floor, and given the victim’s height of forty-four and one-half inches, this was in the range of the height the victim’s head would hit if she were slammed into the wall while standing. He said that the victim’s injuries were not merely impact injuries but that if an impact on sheetrock were the final event bringing the brain to a sudden deceleration, the indentation in the sheetrock could be consistent with the victim’s injuries.

Doctor Deering testified that there are various factors which may account for hair loss. He said a child may have been a “hair twirler” or may have worn her hair tightly braided.

Doctor Deering testified that the pattern bruises on the top of the victim’s head might have been from a hand being placed and held tightly on that portion of her head. He said he had seen the same pattern in other cases. He said on cross-examination that it “may be possible” that someone held the victim’s head when an intercranial bulb was placed to relieve pressure.

Doctor William Frederick McCormick testified as an expert witness for the defendant. He said he was board certified in anatomic pathology, forensic pathology, and neuropathology. He said he was a professor of forensic pathology at Quillen College of Medicine, an adjunct professor of anthropology at the University of Tennessee, and deputy chief medical examiner for the State of Tennessee.

Doctor McCormick testified that a short fall was one which involved a child’s feet being no more than four feet above the ground. He said that although most short falls are relatively harmless, there are “[s]everal million a year” which require hospital admission and that one to two percent of those individuals have fatal injuries from short falls.

Doctor McCormick testified that he reviewed the autopsy report as well as the radiographic and CT studies, photographs of the autopsy, and slides of the brain. He said the victim died as a result of a head injury. He said that the procedures such as intubation and organ harvesting had the potential to produce a wound on the body that “had nothing at all to do with the fatal event.” He said that the harvesting of organs interferes with interpretation to the extent that his office will not do homicide autopsies on donor patients. He said the victim had a pressure monitoring bolt inserted into her head, which would traumatize the area. He said that neither he nor anyone else could say what had caused a particular bruise. He said the victim had a linear skull fracture, which he said was common in over three-fourths of the cases of serious head injuries. He conceded later in his testimony that he was mistaken about the victim having a skull fracture. He said she also had an acute subdural hematoma, which he said was a blood clot below the membrane that covers the brain.

Doctor McCormick testified that Doctor Deering had misinterpreted some of the bruises. He said that some of the victim’s bruises were secondary contusions due to brain hernias. He said that some of the victim’s bruises could have come from the mat that was on the landing at the base of the stairs.

Doctor McCormick testified that in his opinion, the victim’s injuries were consistent with “a backward type fall” that would be expected if a person lost her balance and fell backwards while going up steps. He said the victim’s contusion abrasion on the back of the victim’s head was consistent with pine stairs. He said that in his opinion, all reports were consistent with a fall with significant torque which produced the victim’s injuries. He said a fall down two to three steps onto a firm, hard surface could cause the injuries seen in the victim.

Doctor McCormick testified that prompt medical care was critical in this case. He acknowledged that if untruthful information were given at the emergency room, this “would be a potential impediment” to optimal medical care.

Doctor McCormick testified that he saw a diffuse axonal or rotational injury, which he said was caused by brain deformation and rotation. He said that this could occur from a fall. He said the state’s pathologist did not do the appropriate “section stains.” He said he observed a deceleration injury, which would result when the head and brain stopped moving due to an impact. He also said his findings could not rule out that the deceleration injury occurred from the head moving at some speed and rotating into a wall.

Doctor McCormick testified that the victim had missing hair. He said hitting an abrading surface could pull out hair. He said it was not likely that a person would receive fourteen individual injuries to her head in a short fall. He said, however, that this number of injuries would be unlikely if someone were holding a person’s head and hitting it on a wall. He conceded that this number of injuries would be more consistent with abuse.

Ruby Kay Latham testified that the defendant was her son. She said the victim called the defendant “Daddy” and was affectionate with him. She said the defendant, Monica, and the victim

visited in her home frequently. She said she was with them at Thanksgiving and that the victim played with her grandson and was a happy child. She identified a photograph of the victim with her hair pulled back which was taken at Thanksgiving.

Ms. Latham testified that the defendant and the victim came to her house on December 10, 2002. She said the victim complained of a headache and lay on the couch and watched cartoons. She said that she did not see any bruises on the victim's head or forehead but that she wore her hair down and had bangs. She said that she left to go Christmas shopping and that she received a telephone call later from her daughter, who she said told her the defendant had called and said the victim had fallen and was badly injured and that she was being taken from Cumberland Medical Center to UT Medical Center. She said her daughter reported that the defendant was crying and was difficult to understand. She said that she and her husband went to UT Medical Center and that they saw the defendant, who was upset and crying. She said that the victim was at the hospital three days and that they were eventually told she would not recover. She said the family was allowed to go into the victim's room to say goodbye. She said a chaplain was in the room. She said the defendant held the victim's hand, was crying, and said, "Please, baby, come back" while kissing the victim's hand.

Gary Wayne Latham testified that the defendant was his son. He said that when the defendant was growing up, he had been liked by younger children. He said that he observed the defendant and the victim together and that the victim "took to" the defendant quickly. He recalled that the defendant and the victim had come to his house on December 10 and that the victim had complained of a headache and sat on the couch watching cartoons. He said he and his wife left to go to Knoxville and later received a call that the victim had been injured and was coming to UT Medical Center. He said the defendant was very upset at the hospital and was not allowed to visit the victim because he was not a relative.

Mr. Latham testified that on the second day of the victim's hospitalization, he returned from eating and found out that the defendant was being interviewed by Officers Callahan and Potter. He said he went to the interview room, where the defendant told him "he wanted to tell the story, and tell it like it is. He wanted to get it, everything out front, tell everybody what happened."

Mr. Latham testified that they were eventually informed that the victim was brain dead and that life support was going to be discontinued. He said that at this point, the defendant and his family were allowed to say goodbye to the victim. He said the defendant was teary-eyed and upset.

Monica Renee Latham testified that she was the victim's mother. She said she was an unemployed certified nurse's assistant and lived in Wartburg with the defendant and her ten-month-old child. She said the victim was born on August 17, 1997. She said she met the defendant in September 2002, when she was cruising Crossville with her sisters. She said she and the defendant decided to live together and moved into a house on Prentice Street. She said the defendant helped the victim with her homework and "took real good care of her." She said the victim loved the defendant as if he were her father. She said that she was working a second shift job and that the victim would stay with the defendant or Ms. Latham's mother while she was at work. She said her

sisters moved into the Prentice Street home with them in October because her parents were separated and their mother did not have room for them.

Ms. Latham testified that she met the defendant's parents on Thanksgiving. She said by this point, the victim was calling the defendant "Daddy." She identified a photograph of the victim from Thanksgiving. She said the victim had a bruise on the side of her head in the photograph, which had happened when she hit her head on a table. She later admitted on cross-examination that this was how the bruise "could" have occurred but that she did not know.

Ms. Latham testified that the victim wore her hair half up in a "mushroom head" style and that the victim's hair was very thin on the sides. She said the victim had a history of lice infestations since the age of three. She said she used a treatment and a comb on the victim's hair for the condition.

Ms. Latham testified that she had spoken with the victim's teacher after the victim came home with a bruise on her temple. She said the victim had reported that another child had pushed her down.

Ms. Latham testified that the defendant used "time out" to discipline the victim and that he sometimes spanked her with a "love tap." She said she never saw anything abusive. She said that she did most of the discipline. She acknowledged that representatives of DCS and law enforcement had been to her house in October to inquire about an injury to the victim's lip. She said that the defendant had been caring for the victim, that the victim had called Ms. Latham a b----, and that he had "gently tapped her lips." She said the victim told her about the incident when she came with the defendant to pick Ms. Latham up at work that evening. She admitted on cross-examination that she had given a statement to an investigator on December 12, 2002, that the victim had hurt her lip when she slipped on flooring in the home. She also testified that the victim had slipped in water and fallen that same night. She said her sisters could not have witnessed the defendant hitting the victim on the mouth because her sisters were not home on the day in question. She said on cross-examination that she did not remember what she told the DCS investigator in October. She later admitted on further cross-examination that the defendant had backhanded the victim and she had lied for him.

Ms. Latham testified that she and her sister Sonda did not get along well but that she had a better relationship with her sister Shanna. She said that when Sonda lived in the Prentice Street house, Sonda was at her boyfriend's house much of the time after school. She said that she noticed that the victim was shying away from Sonda and that she found out that Sonda had been telling the victim that the defendant did not love her and was going to beat her. She said the victim denied that the defendant had ever hurt her. She said she had not spoken with her sisters or her mother in two years. She said that her mother and the victim were close.

Ms. Latham testified that the victim did not go to school on December 10, 2002, because she had a cold. She said she bathed the victim the previous evening and saw no bruises on the victim's body and saw the normal amount of thinning hair on the sides of the victim's head. She said that

she left the house at 9:30 or 10:00 a.m. to go to work and that when she returned shortly after 2:00, the defendant was outside and asked her to come inside quickly. She said there were two DVDs on the mat and she stopped to pick them up before she went inside. She said she found the victim inside the house lying on the bed. She said one of the victim's eyes was closed and the other was half closed. She said the victim appeared to be "in a dead sleep." She said the victim's coat was on the bed next to her and that she was wearing a t-shirt and jeans. She said the defendant told her the victim had fallen when he had his back turned to close his truck door after he lifted her over a mud puddle when getting out of the truck. She said she drove to the emergency room with the defendant in the passenger seat giving rescue breathing to the victim, who was having trouble breathing.

Ms. Latham testified that at the hospital, she and the defendant were asked to leave the triage room when the defendant bumped into a medical table. She said the defendant told the medical personnel at Cumberland Medical Center that the victim had fallen down stairs. She said she was told that the victim had a closed head injury and could not be treated in Crossville. She said she rode with the victim in the ambulance to UT Medical Center.

Ms. Latham testified that the defendant stayed with her at UT and that he cried and helped her pray. She said she was questioned by law enforcement and that she told them repeatedly that the defendant had said the victim had fallen down stairs. She said she did not recall the defendant telling her they were going to try to blame him.

Ms. Latham testified that she had never seen an indentation in the drywall behind the victim's door. She said the victim's bedroom door was never closed. She said she did not believe her sisters' testimony that the defendant took the victim into the bedroom and gave her spankings. She said that she would have left the defendant if she had seen any abuse toward the victim.

The defendant testified that he lived with his wife, Monica Latham, and their ten-month-old daughter. He said he had never been in trouble or been arrested. He said he met Monica in September 2002 when he was cruising Crossville. He said that he met the victim within a few days of meeting Monica and that he and Monica decided to live together within two and a half or three weeks. He said that he played with the victim and helped her with her homework and that she called him "Daddy." He said Monica was the victim's primary caregiver and he assisted her. He said he disciplined the victim on one occasion by spanking her and sending her to her room, which he said was in accord with instructions he had been given by Monica about disciplining the victim. He said that on another occasion, the victim "called her mother the 'B' word" and he "took three fingers and gently tapped her on the lips and said, 'No[.]'" He said neither of the victim's sisters witnessed this.

The defendant testified that he helped Monica's sister Shanna with her homework. He said Monica's sister Sonda was older and more distant. He said Sonda preferred to be with her boyfriend or friends and never really wanted to stay at the home he shared with Monica and the victim.

The defendant testified that the victim was very close to her grandmother. He said she was allowed to visit her grandmother whenever she wanted and confided everything in her grandmother.

The defendant testified that on December 10, 2002, the victim was dizzy and had a headache. He said that after Monica left for work, the victim asked to take a shower and that he helped her get soap out of her eyes. He said he was unaware whether the victim had taken a bath the previous evening because he had been at work. He said he did not see any bruises on the victim. He said they went in the cold, rainy weather to his parents' house in Wartburg. He said the victim lay on the couch watching television while he unloaded lumber out of a truck. He said they stayed at his parents' house a little over an hour and then returned to Crossville, stopping on the way at a video store to get movies.

The defendant testified that when they got home at 2:00 p.m., he came around to the victim's side of the truck to help her get over a mud puddle. He said the victim had Cheetos and the movies as she walked toward the stairs, which he said were "rickety" and were not sheltered from the hard rain that was falling. He said the victim was walking quickly because she had to use the bathroom. He said he turned to get his jacket and cigarettes out of his truck and heard, "Da," and a thud. He said he turned and saw the victim lying on the ground. He said the victim had one eye closed and one "kind of open" and did not respond to his voice or his request for her to squeeze his finger. He said he carried her inside to her bed and called Monica's place of employment but was told she had already left. He said he heard Monica driving up and ran outside to get her. He said he told Monica that the victim fell and that they needed to go to the hospital. He said he performed rescue breathing on the victim because she was having trouble breathing on the way to the hospital.

The defendant testified that he and Monica were both upset at the hospital and that he could not see well because of his tears and accidentally hit a medical tray, which caused the hospital personnel to tell him and Monica they needed to leave the room. He said the first time he was asked by someone at the hospital what happened, he said, "Hope was at home, she was on the first stair. I turned to lock the door, and I heard her say 'Da', and then I heard a thud. And I turned around, and there she was laying on the ground." He said that he said the same thing when he was questioned again and that he never refused to answer questions. He said they were told that the victim had to be taken to UT Medical Center but that the weather was too bad for Life Star, requiring transport by ambulance.

The defendant testified that after he arrived at UT, he was questioned by a nurse and gave her the same information he had given everyone else. He said Jennifer Fisher from DCS and Wiley Potter from the Sheriff's Department also questioned him that night and that he told them what happened. He said he was tired and scared and could not recall much of what he said, although he said he never refused to answer their questions. He said that he and Monica remained at the hospital and that the next evening, he was questioned by Tommy Callahan from the TBI and by Officer Potter. He said he answered their questions and gave the same information he had given previously. He said that his father interrupted the interview to ask if he had been read his rights and whether he needed a lawyer. He said that his father tried to get him to leave but that he stayed to tell the officers what happened because he had not done anything wrong. He said he left at Monica's request to go home to get some clothes and other personal items that evening. He said the next day, they were told that the victim was not going to make it and that they should say their goodbyes. He said they were

told they could only touch the victim's hands. He said they knelt beside her, prayed, and said goodbye. He said he told her, "Please, baby, come back. Daddy loves you. Please come back. We need you." He said the chaplain must have misunderstood what he said.

The defendant testified that "at the very first" he had been asked to sign a consent form to allow the authorities to search his home and that he had done so. He said that when he went to his house to get the items Monica had requested, he found the inventory list left by the officers. He said he was confused about some of the items on the list and asked about the list. He said that he asked whether the officers had found any signs of a struggle because he had been told by Officers Callahan and Potter "that they were looking for a knock-down, drag-out fight in the house."

The defendant testified that he never noticed the condition of the drywall in the victim's bedroom. He said the door was always open.

The defendant testified that he did not see any bruises on the victim's head when she was at the bottom of the steps. He said they appeared after she was at the hospital. The defendant said he loved the victim and would never hurt her. He admitted that he struck the victim with three fingers on the mouth on one occasion. However, he said he never abused her. He denied that he had ever told Monica's sisters to turn up the television and taken the victim into the bedroom and spanked her, causing her to scream. He said Monica's sisters were lying when they said they saw him hit the victim across the mouth.

The defendant testified that the victim was injured within seconds of when they arrived home at 2:00 p.m. He said it would take Monica five or six minutes to drive home from work after she got off work at 2:15. He said he "was not aware of the time that passed" between the victim's fall and Monica's arrival. He acknowledged that the victim appeared to be seriously injured and that twenty-one minutes would have passed. He admitted he did not call 9-1-1 or scream for a neighbor. He said he did not call 9-1-1 because he was "just the boyfriend" and had been told that a child would not be treated if a guardian were not present. He said he also thought he could get the victim to the hospital more quickly than an ambulance. He said that after he called Monica's workplace and was told she was on her way home, he waited for her. He also said he heard her arriving when he hung up the telephone. He admitted that he told an investigator he did not take the victim to the hospital immediately because he did not know where it was located. He acknowledged that the victim arrived at the hospital at 2:37 p.m.

The defendant said on cross-examination that he and the victim left their coats in the truck. He said they were going to use the bathroom and come back outside.

The defendant testified that he did not have a problem with his temper. He denied that he had been transferred to a different location at a previous job because he had cursed at his mother. He said his mother was the supervisor at the location where he was working and it was against the employer's policy for a relative to supervise a relative.

After receiving the evidence, the jury found the defendant not guilty of felony murder in the perpetration of aggravated child abuse but guilty of the lesser included offense of aggravated child abuse on the first count of the indictment. The jury found the defendant guilty of aggravated child abuse on the second count of the indictment. The trial court merged the convictions and imposed a twenty-two year sentence to be served as a Violent Offender in the Department of Correction. The defendant then filed the present appeal.

I

The defendant contends that the trial court erred in denying his motion for judgment of acquittal. On appellate review of a denial of a motion for judgment of acquittal, we apply the same standard as a question of the sufficiency of the evidence. *See, e.g., State v. Brewer*, 945 S.W.2d 803, 805 n.2 (Tenn. Crim. App. 1997). Our standard of review is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). This means we do not reweigh the evidence but presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. *See State v. Sheffield*, 676 S.W.2d 542, 547 (Tenn. 1984); *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). For an accused to be convicted of a criminal offense based solely upon circumstantial evidence, the facts and the circumstances “must be so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant, and that beyond a reasonable doubt.” *State v. Sutton*, 166 S.W.3d 686, 691 (Tenn. 2005) (quoting *State v. Crawford*, 225 Tenn. 478, 470 S.W.2d 610, 612 (1971)).

The defendant was convicted of aggravated child abuse. At the time of the offense, the relevant statute provided, “A person commits the offense of aggravated child abuse or aggravated child neglect who commits the offense of child abuse or child neglect as defined in § 39-15-401 and . . . the act of abuse or neglect results in serious bodily injury to the child” T.C.A. § 39-15-402(1)(a) (2002). Child abuse or neglect, under the relevant statute, occurred when, “Any person who knowingly, other than by accidental means, treats a child under eighteen (18) years of age in such a manner as to inflict injury or neglects such a child so as to adversely affect the child’s health and welfare” T.C.A. § 39-15-401(a) (2002).

The defendant argues that the jury’s finding that the defendant was not guilty of felony murder in the perpetration of aggravated child abuse is irreconcilable with its verdict that the defendant was guilty of aggravated child abuse. Therefore, he reasons, “[T]he jury could not determine beyond a reasonable doubt that [the defendant] inflicted the injuries that caused [the victim’s] death.” He further reasons that the jury’s verdict “is based upon alleged prior bad acts, and improperly admitted testimony concerning [the defendant’s] behavior and alleged statement at the hospital.”

We decline to engage in speculation regarding the jury’s rationale. Our inquiry focuses on whether the evidence is sufficient to support the verdict for the offense of which the defendant was

convicted. See State v. Wiggins, 498 S.W.2d 92 (Tenn. 1973) (holding that consistency in verdicts between counts of a multiple-count indictment is not required and focusing on whether evidence supported guilt of the convicting offense); State v. Stanley Craig Hughes, No. E2004-00105-CCA-R3-CD, Bradley County (Tenn. Crim. App. Sept. 24, 2004) (holding that defendant's aggravated assault conviction was supported by sufficient evidence despite defendant's argument that jury's acquittal of him on second degree murder count meant jury accepted his self-defense theory, which was inconsistent with the verdict on the aggravated assault count), app. denied (Tenn. Dec. 28, 2004).

In the light most favorable to the state, the evidence establishes that the victim suffered serious bodily injury while in the exclusive care of the defendant. The state's evidence from three medical doctors who treated the victim or examined her body post-mortem established that the victim's injuries were not consistent with the defendant's explanation of how they occurred. Further, the state's evidence demonstrated that the victim's injury was consistent with her head having been slammed into a wall in her bedroom where an indentation in which an imbedded strand of her hair was found. Although the defendant testified that the victim was injured in a fall and that he did not cause her injuries, the jury had the opportunity to assess his credibility during his testimony and weigh it against the conflicting proof. Likewise, the jury had the opportunity to weigh the testimony of defense expert Dr. McCormick that the victim's injuries were consistent with the defendant's report that she had fallen down stairs against the contrary testimony of the state's medical witnesses. From the evidence, a rational trier of fact could find that the defendant committed the offense of aggravated child abuse. Thus, the evidence is sufficient to support the conviction, and the trial court did not err in denying the motion for judgment of acquittal.

II

Next, we consider the defendant's claim that the trial court erred in admitting evidence of prior instances of harsh discipline of the victim by the defendant. He argues that this evidence should have been excluded under Tennessee Rule of Evidence 404(b) because it was irrelevant and unfairly prejudicial. The state counters that the evidence was properly admitted to show absence of mistake or accident.

Tennessee Rule of Evidence 404(b) prohibits the introduction of evidence of other crimes or acts, except when the evidence of other acts is relevant to a litigated issue, such as identity, intent, or absence of mistake or accident, and its probative value is not outweighed by the danger of unfair prejudice. Tenn. R. Evid. 404(b), Advisory Comm'n Cmts. The rule states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. It may, however, be admissible for some other purpose. The conditions which must be satisfied before allowing such evidence are:

- (1) The court upon request must hold a hearing outside the jury's presence;
- (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling and the reasons for admitting the evidence;
- (3) The court must find proof of the other crime, wrong, or act to be clear and convincing; and
- (4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Tenn. R. Evid. 404(b). We review a trial court's ruling on evidentiary matters under Rule 404(b) for abuse of discretion, provided the trial court has substantially complied with the procedural prerequisites of the rule. State v. DuBose, 953 S.W.2d 649, 652 (Tenn. 1997). If the court did not substantially comply with the procedure, its decision is not entitled to deference by the appellate court. See id. at 653.

The court conducted a hearing on the defendant's motion in limine to exclude this evidence. The record reflects that several witnesses testified at that hearing, although the transcript of that hearing is not part of the appellate record in this case. The appealing party is required to prepare an adequate record for appellate review. Tenn. R. App. P. 24(b). "When a party seeks appellate review there is a duty to prepare a record which conveys a fair, accurate and complete account of what transpired with respect to the issues forming the basis of the appeal." State v. Ballard, 855 S.W.2d 557, 560 (Tenn. 1993). Notwithstanding this deficiency, we have elected to take notice of this court's record of the defendant's application for an interlocutory appeal, which includes a transcript of the hearing. See Tenn. R. App. P. 9 (interlocutory appeals); Tenn. R. Evid. 201 (judicial notice); State v. Gary Joseph Latham, No. E2004-03009-CCA-R9-CD, Cumberland County (Tenn. Crim. App. Jan. 20, 2005) (defendant's Rule 9 application denied by order).

The transcript of the motion hearing includes the testimony of Shanna Manning, Sonda Manning, the victim's two kindergarten teachers, and a DCS employee. The testimony of the Mannings and the kindergarten teachers was substantially in accord with their trial testimony. The DCS employee testified about her investigation of the injury to the victim's lip and the fatal injury.

The trial court found

As to the issue of prior bad acts, the Court finds that a material issue exists as to intent and absence of mistake/accident. This material issue is independent of conduct confirming with a character trait of the defendant and is highly probative. The Court, having heard proof by testimony of Sonda and Shana Manning, finds that the prior bad acts did occur by clear and convincing evidence. The Court has weighed the probative value of the material issue with the danger of

prejudice to the defendant and finds that the highly probative value of the evidence outweighs any danger of unfair prejudice to the defendant. The Court finds the evidence admissible.

The trial court's findings are in substantial compliance with the Rules of Evidence. Upon review of the record and the transcript of the motion hearing, we are not convinced that the trial court abused its discretion in admitting the evidence. See State v. Dubose, 953 S.W.2d 649 (Tenn. 1997); State v. Lacy, 983 S.W.2d 686, 693 (Tenn. Crim. App. 1997). The defendant is not entitled to relief.

III

The defendant claims the trial court erred in admitting the testimony of David Roberts, the UT Medical Center Chaplain who testified he overheard the defendant say, "Baby, baby, come back. Daddy won't hurt you." He argues that this evidence violated the clergy-penitent privilege, which provides:

No minister of the gospel, priest of the Catholic Church, rector of the Episcopal Church, ordained rabbi, or regular minister of religion of any religious organization or denomination usually referred to as a church, over eighteen (18) years of age, shall be allowed or required in giving testimony as a witness in any litigation, to disclose any information communicated to that person in a confidential manner, properly entrusted to that person in that person's professional capacity, and necessary to enable that person to discharge the functions of such office according to the usual course of that person's practice or discipline, wherein such person so communicating such information about such person or another is seeking spiritual counsel and advice relative to and growing out of the information so imparted.

T.C.A. § 24-1-206(a)(1).

Chaplain Roberts was present in the victim's hospital room along with the defendant, members of the victim's family, and members of the defendant's family as the families said goodbye to the victim and the victim's life support was discontinued. The language of the statute provides that a clergy member is prohibited from testifying about information communicated when the penitent was "seeking spiritual counsel or advice" related to the information communicated. In the present case, the defendant has not explained, nor does the record reflect, how the defendant was in the process of seeking spiritual counsel or advice when he made the statement. The statement was made to the victim, and Chaplain Roberts was a bystander to the communication. The trial court did not err in admitting this evidence based upon the clergy-penitent privilege.

IV & V

The defendant complains about the trial court's admission of two physicians' testimony, Doctor Charise Jons and Doctor Mary Campbell. Rule 702 of the Tennessee Rules of Evidence addresses the admissibility of opinion testimony of expert witnesses. It states in pertinent part:

If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.

Tennessee Rule of Evidence 703 requires the expert's opinion to be supported by trustworthy facts or data "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." The determining factor is "whether the witness's qualifications authorize him or her to give an informed opinion on the subject at issue." State v. Stevens, 78 S.W.3d 817, 834 (Tenn. 2002). Evidence constitutes "'scientific, technical, or other specialized knowledge,' if it concerns a matter that 'the average juror would not know, as a matter of course.'" State v. Murphy, 953 S.W.2d 200, 203 (Tenn. 1997) (quoting State v. Bolin, 922 S.W.2d 870, 874 (Tenn. 1996)). Questions regarding the admissibility, qualifications, relevancy, and competency of expert testimony are left to the discretion of the trial court. McDaniel v. CSX Transp., Inc., 955 S.W.2d 257, 263-64 (Tenn. 1997). A trial court's ruling on the admissibility of such evidence may be overturned on appeal only if the discretion is exercised arbitrarily or abused. Stevens, 78 S.W.3d at 832.

Testimony of Doctor Charise Jons

The defendant claims the trial court erred in allowing Doctor Charise Jons, the emergency room physician, to testify, "I can say with a hundred percent certainty that there is no way this child fell down one, two, three, or four of these stairs and sustained the injuries that I examined and witnessed on her body." The defendant says this opinion was outside her area of expertise. He argues that Doctor Jons presented no expertise in or was not board certified in pathology or forensics, and he contrasts her testimony with that of Doctor McCormick, who was board certified in pathology and forensics, and who offered a contrary opinion regarding the victim's injuries.

Doctor Jons testified that she was board certified in emergency room medicine, had a master's degree in anatomy, was licensed to practice medicine in two states, had reviewed the report of the victim's CT scan and pathology, and had followed the victim's case after she left Cumberland Medical Center. She was the victim's treating physician in the emergency room.

Upon review, we are unpersuaded that the trial court abused its discretion in admitting Doctor Jons' testimony. The doctor's "knowledge, skill, experience, training, or education" qualified her to render an opinion regarding the consistency of the victim's injuries with the account of the injuries

given by the defendant. See Tenn. R. Evid. 702. The trial court did not err in determining that Doctor Jons was qualified to give an informed opinion on the causation of the victim's injuries and that this information would substantially assist the trier of fact. That Doctor Jons chose to express her opinion in terms of one hundred percent certainty, rather than "to a reasonable degree of medical certainty," speaks to the firmness of her conviction about her opinion, not to the admissibility of the opinion. The trial court did not abuse its discretion in allowing this testimony.

Testimony of Doctor Mary Campbell

The defendant claims the trial court erred in allowing Doctor Mary Campbell to testify about "child sexual abuse syndrome." The testimony in question occurred on cross-examination. The transcript reflects that the following occurred:

Q [Defense attorney]. And it's true, is it not, that children are often uncharacteristically truthful?

A. I don't know what that would mean. I'm sorry, I . . .

Q. You don't know what children and truthful means?

[District Attorney]: I don't know if that's in her field of ex. . .

A. No uncharacteristically, I think children and . . .

. . .

A. Children have an ability, generally age dependent, to tell truth and to perceive truth. I don't find it uncharacteristic.

Q. And children typically, if they're being harmed or hurt, they tell that to people; correct?

A. That, unfortunately, is not always correct.

Q. Not always correct, but sometimes it is?

A. Sometimes it is. But in the majority of children, particularly, I can give you multiple examples, but it's specifically in sexual abuses, it's been well determined that children are . . .

[Defense Counsel]: We're not, Judge, we're not talking about sexual . . .

THE COURT: You asked the question, so she may answer.

A. They're very hesitant to . . .

[Defense Counsel]: Sexual abuse?

THE COURT: She's just giving examples. You asked her about that.

Q. Okay. And in this case, you . . .

[District Attorney]: I'd like for her to finish her answer if she could.

Q. I thought you had, Doctor.

A. No.

Q. Okay.

- A. Children are very hesitant to reveal that. In my work in that area, particularly I found that children about the age of five tend to assume some responsibility or culpability for actions that have happened to them or involve them.

The defendant argues that testimony about “child sexual abuse syndrome” is inadmissible, citing several reported cases of this court. However, in this case, the witness was not testifying about “child sexual abuse syndrome,” nor was the state attempting to obtain a conviction of the defendant for sexual abuse of a child. Additionally, the defendant elicited the evidence on cross-examination in what appears to have been an attempt to establish that it would be typical of victims of child abuse to report the abuse to someone. The defendant opened the door to the witness’ testimony, and the witness was allowed to clarify her answer. No connection was made between the victim’s injuries and “child sexual abuse syndrome,” a term used only in the defendant’s brief and not by the witness herself. The trial court did not err in allowing this evidence.

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

JOSEPH M. TIPTON, PRESIDING JUDGE